INDEX

	PAGE
Opinion Below, Jurisdiction and Statutes Involved	1
Counterstatement of Questions Presented	2
Counterstatement of the Case	3
Argument	6

CITATIONS

Cases

American Airlines, Inc. v. C.A.B. (D.C. Cir. 1951) 192 F. 2d 417 10

Atlantic Coast Line R. Co. v. Florida (1935), 295 U.S. 301 .... 14, 15

Atlantic Refining Company v. Public Service Commission of the State of New York (1959), 360 U.S. 378 .....6, 8, 9, 12, 16, 17

Atlantic Refining Company v. Federal Power Commission (D.C. Cir. 1963), 316 F. 2d 677 .....12, 17, 18

Baltimore & Ohio R. Co. v. United States (1936), 298 U.S. 349 ..... 10, 15

California Oil Company v. Federal Power Commission (10 Cir. 1963), 315 F. 2d 652 .....12, 13, 18

City of Pittsburgh v. Federal Power Commission (D.C. Cir. 1955), 237 F. 2d 741 10

Federal Power Commission v. H. L. Hunt, et al (1964), 376 U.S. 515, 84 S. Ct. 861 .....8, 17, 18

Federal Power Commission v. Natural Gas Pipeline Company of America (1942), 315 U.S. 575 ..... 10, 15

Federal Power Commission v. Pacific Light & Power Co. (1939), 307 U.S. 156 10

Federal Power Commission v. Transcontinental Gas Pipe Line Corporation (1961), 365 U.S. 1 7

Morand Bros. Beverage Co. v. National Labor Relations Board (7 Cir. 1953), 204 F. 2d 529 10

Pacific Natural Gas Co. v. Federal Power Commission (9 Cir. 1960), 276 F. 2d 350 10

Public Service Commission of the State of New York v. Federal Power Commission (D.C. Cir. 1960), 287 F. 2d 146 10

Public Service Commission of the State of New York v. Federal Power Commission (D.C. Cir. 1964), 329 F. 2d 242..11, 12, 14

PAGE

Texaco Inc. v. Federal Power Commission (5 Cir. 1961), 290 F. 2d 149 ..... 12, 18, 19

United Gas Improvement Company v. Federal Power Commission (9 Cir. 1960), 283 F. 2d 817 9

United Gas Improvement Company v. Federal Power Commission (10 Cir. 1961), 287 F. 2d 159 9

United Gas Improvement Company v. Federal Power Commission (5 Cir. 1961), 290 F. 2d 133 9

United Gas Improvement Company v. Federal Power Commission (5 Cir. 1961), 290 F. 2d 147 ..... 9, 10

United Gas Pipe Line Co. v. Memphis Gas, Light and Water Division (1958), 358 U.S. 103 16

United Gas Pipe Line Co. v. Mobile Gas Service Corp. (1956), 350 U.S. 332 16

Wisconsin v. Federal Power Commission (1963), 373 U.S. 294 ..... 15, 16, 17

Statutes

Natural Gas Act, June 21, 1938, c. 556, 52 Stat. 821-833, as amended, 15 U.S.C. 717-717w:

Section 4, 15 U.S.C. 717c 14, 17

Section 5, 15 U.S.C. 717d 14

Section 7, 15 U.S.C. 717f 6, 8, 9, 16, 17

Commission Orders

The California Co. (1959), 22 FPC 252 3

The Superior Oil Company (1959), 22 FPC 369 3

IN THE

Supreme Court of the United States

OCTOBER TERM 1964

No. 756

FEDERAL POWER COMMISSION,

Petitioner,

v.

CALLERY PROPERTIES, INC., ET AL.,

Respondents.

No. 671

THE UNITED GAS IMPROVEMENT COMPANY,
LONG ISLAND LIGHTING COMPANY, and
PHILADELPHIA ELECTRIC COMPANY,

Petitioners,

v.

CALLERY PROPERTIES, INC., ET AL.,

Respondents.

No. 678

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,

Petitioner,

v.

CALLERY PROPERTIES, INC., ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE SUPERIOR OIL COMPANY IN OPPOSITION

The Opinion below, Jurisdiction of the Court, and Statutes involved are sufficiently set forth in one or more of

the above Petitions to which this Reply is addressed. It is felt that a counterstatement of the questions presented will be helpful.

COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Is the "in line" price level the only factor to be considered by the Federal Power Commission in determining the requirements of present and future public convenience and necessity in a certificate proceeding under Section 7 of the Natural Gas Act?

2. Must evidence, relevant and material to establish and permit evaluation of factors of present and future public convenience and necessity, and which shows that a price greater than the "in line" price is required by the public interest,[1] be excluded from a certificate hearing because (a) it might extend the hearing time and record made, or (b) such evidence might also be admissible in an individual rate proceeding involving the certificate applicant?

3. Where for more than four (4) years gas has been sold at rates established under unconditional permanent certificate orders, after vacation of such orders may the Commission order refunds with interest of the amounts collected during said years in excess of an "in line" price when it is uncontroverted that the "in line" rates may not be just and reasonable, and the evidence tendered shows that such "in line" prices are confiscatory?

4. Where jurisdictional gas sales have commenced under a permanent unconditioned certificate order and may not be discontinued except by further Commission order under Section 7(b) of the Natural Gas Act, may the Commission

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[1] As pointed out in Petition No. 756, Pg. 15, footnote 14, the Court below did not reach the propriety of the Commission's determination of "in line" price. That issue is not before this Court, but was challenged below.

condition a further permanent certificate, issued after vacation and remand of its prior order, to preclude the applicant from filing for contractually authorized rate changes during the next four (4) years when the rate fixed in the reissued certificate order may not be just and reasonable?

COUNTERSTATEMENT OF THE CASE

The instant proceeding is an administrative monstrosity of the type which the above Petitioners feared would result from the opinion of the Court below. This is a consolidated proceeding resulting from five separate original hearings and decisions by the Commission, each of which included large consolidations (one as many as 69 separate applications) in which separate unconditional permanent certificate orders were issued by the Federal Power Commission (Commission) during 1958 and 1959.[2] Superior was a party in only two of the original separate proceedings[3], certificated by the Commission on August 10, 1959 in separate orders. After separate judicial review of the various Commission orders, the reversal thereof and remand to the Commission, the certificate applications of Superior were consolidated for rehearing after the remand with the other applications; however, because of the separate nature of the original proceedings, a number of the orders applicable to one or more of the present parties had no effect as to others. Thus, the Commission order "advising the producers of their potential obligation to refund" (J. App. 395) mentioned in the Commission's Petition No. 756, Pg. 5, relates only to parties other than Superior.[4]

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[2] Footnote 3, Pg. 6, Petition No. 671, United Gas Improvement Company, et al.

[3] The California Co., 22 FPC 252 (1959), and The Superior Oil Company, 22 FPC 369 (1959).

[4] See Opinion below, 335 F. 2d 1004, 1009 footnote 8.

The order fixing the hearing date after remand provided that the hearing was to be limited to the "public interest initial price" for the various applications but was not to "foreclose any party from presenting evidence which he believes would compel the conclusion that a higher price [than an "in line" price] would be in the public interest" (J. App. 416). At said hearing the Examiner, subsequently affirmed by the Commission, ruled that "the only testimony that we can put in in this case has to do with the price line" (J. App. 201), and thereupon excluded from the record evidence offered to show cost-of-service of Superior, its minimum financial requirements for finding and producing gas nation-wide, and in this area, the existing demand and supply situation, the relation of field prices to exploration for and the finding of gas, and the adverse impact of reduced field prices on exploratory efforts.[5]

Based only on the "price line" testimony admitted into evidence, the Examiner found, and the Commission affirmed, that after eliminating all prices above 18.5¢ per MCF as suspect, the "in line" price in 1958 was 18.5¢ per MCF (J. App. 558). This determination of "in line" price was challenged below, but the issue was not reached as the decision of the Commission was reversed on other grounds, and the issue is not present here.

Having found the "in line" price, the Commission then conditioned reissuance of permanent certificates on refund of all amounts collected in excess of that price under its previous unconditioned orders which had been reversed, forbade the applicants to seek price increases authorized by their respective contracts in excess of 23.55¢ per MCF for nearly four years (to July 1, 1967 or the termination of its South Louisiana Area Rate Proceeding AR61-2, whichever

[5] See Opinion below, 335 F. 2d 1004, 1009.

was earlier), and imposed other conditions and refunds not material to disposition of the above Petitions.

The Court below held that in view of the peculiar circumstances of this case and based on the teachings of this Court in *CATCO*[6] although the initial price and its relation to the existing price line is a prime factor in determining the present or future public convenience and necessity, yet the line price is not the sole factor to be considered in determining the public convenience and necessity, and evidence to justify an out-of-line price is admissible. The Court further held that although the Commission has authority to order reparations by refunds in granting a permanent certificate under the peculiar circumstances here obtaining (the gas having been sold for a number of years under Commission orders which were reversed and the sellers having no option to reject a reissued certificate regardless of conditions contained therein), such refund amount could properly be only the difference between the amounts collected and rates which are found to be just and reasonable. Further, that the obligation to refund, affecting only past rates, should be delayed pending the determination of just and reasonable rates in order to prevent irreparable injury and to do justice to all parties. The Court also held that the Commission could not, by conditions imposed, re-write or eliminate the statutory procedures established by Congress for the changing of rates by a natural gas company.

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[6] *The Atlantic Refining Co.* v. *Public Service Com. of New York* (1959), 360 U.S. 378.

ARGUMENT

We show below that as to the questions raised by the several Petitions here opposed, the decision of the Court below is fully supported by prior decisions of this Court and is not in conflict with decisions of other Courts of Appeals. Thus, there is no real issue here raised as to possible determination of an important question of Federal law that has not been, but should be, decided by this Court.

All Factors of Public Convenience and Necessity Must be Considered

The Court below held that "in line" price is not the only factor to be considered in determining whether the certification of a sale of natural gas is required by present or future public convenience and necessity, and reversed the Commission for its failure and refusal to consider other evidence which would show a "reason why" even an "out-of-line" price might be required in the public interest.

The Court below relied upon and is supported by this Court's *CATCO* decision, *The Atlantic Refining Company* v. *Public Service Com. of New York* (1959), 360 U.S. 378. *CATCO* did not "instruct" the Commission to prevent all "higher priced" gas from ever entering the interstate market regardless of the facts involved. The Court clearly held that gas should not be permitted to enter the interstate market unless required by present or future public convenience and necessity, as to which the initial price is a factor of prime importance in determining such convenience and necessity, but "* * * that rates are [not] the only factor bearing on public convenience and necessity, for Section 7(e) *requires* the Commission to evaluate *all* factors bearing on the public interest." (Pg. 391, emphasis added) Further, that where a proposed initial price is out of line "the Commission in the exercise of its discretion might attach such conditions as it believes necessary" unless the RECORD before the Commission establishes a "reason

why" such higher price is required by the public convenience and necessity. (Pgs. 391 and 393). If there is no "reason why" in the record, then the Section 7(e) conditioning procedure is to be employed.

This specific holding was approved and re-announced with emphasis by Chief Justice Warren in *Federal Power Commission* v. *Transcontinental Gas Pipe Line Corporation* (1961), 365 U.S. 1:

> "In fact in interpreting this very section we said that 'Sec. 7(e) requires the Commission to evaluate *all* factors bearing on the public interest' ****." (Pg. 8)

And:

> "In this connection, it must be realized that the Commission's powers under Section 7 are, by definition, limited. **** The Commission cannot order a natural gas company to sell gas to users that it favors; it can only exercise a veto power over proposed transportation and it can only do this when a balance of *all* the circumstances weighs against certification." (Pg. 17, footnote omitted.)

In the last mentioned case denying Respondent's claim that the Commission had used its power to prevent a levering upward of field prices to bar direct sales of gas, it was said:

> "Certainly such action would be contrary to our previous statements that the term 'public convenience and necessity' connotes a flexible balancing process, in the course of which all the factors are weighed prior to final determination. United States v. Detroit & Cleveland Navigation Co., supra[19] * * * * as the Commission stated, 'countervailing factors suffice to *tip the balance* against the grant of the authority requested by Transco'." (pgs. 23-24) The footnote indicated reads as follows:
>
> "[19] Compare the cases which have held that *it was error for the Commission to refuse to consider certain factors* within its power of notice. E.g., City of Pittsburgh v. Federal Power Commission, 99 U. S. App. D.C. 113, 237 F. 2d 741." (Emphasis added)

Some of the factors which bear upon present and future public convenience and necessity, or public interest, are

pointed to in this Court's recent decision (March 30, 1964) in *Federal Power Commission* v. *H. L. Hunt, et al.*, 376 U.S. 515, 84 S. Ct. 861. There Justice Clark, speaking for the Court, interpreted the present Sections 7(c) and (e) of the Natural Gas Act by making reference to legislative history at the time of the section's amendment in 1942. He stated that the purpose of the amendment[7] was to give "the Commission an opportunity to scrutinize the financial setup, the adequacy of the gas reserves, the feasibility and adequacy of the proposed services, and the characteristics of the rate structure" of the proposal submitted. (84 S. Ct. at Page 867). These elements, at least, constitute factors of public convenience and necessity. They are matters which the Commission *must* consider in an initial certification, or in affixing any condition to a certificate to be issued. The evidence tendered by Superior and erroneously rejected by the Commission would cover these items, *i.e.*, the financial setup and characteristics of the rate structure would be disclosed by Superior's cost-of-service (J. App. 365-369); the adequacy of the gas reserves is a relative matter dependent on the extent of demand (J. App. 283-285). The feasibility of a proposed sale is determinable from the cost of drilling, operating and reworking of wells (J. App. 284, 361-365). These costs must be related to the price proposed, which should not impair the financial stability of the seller. A compensatory rate, at least the lowest reasonable rate,[8] for the sale of the gas is a minimum requirement for the feasibility of a proposed sale and maintenance of the original service for a reasonable time in the future. The con-

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[7] Which required certification for any new service, in lieu of the old requirement for certification only in areas where service was already available.

[8] *CATCO, supra,* "**** As the original Sec. 7(c) provided, it was 'the intention of Congress that natural gas shall be sold in interstate commerce **** at the lowest possible reasonable rate consistent with the maintenance of adequate service in the public interest'." (Pg. 388)

tinuity of supply is completely interrelated with the financial integrity of the producer. A producer's ability to continue operations and to keep its leases alive is dependent in large measure on the rates received. If these matters are to be "scrutinized", then clearly evidence concerning them is relevant and material. Since these are matters of public convenience and necessity, the Commission is *required* by Section 7 to consider them. *CATCO, supra.*

Not only did the Court below follow this Court in the above holding, it also followed and is supported by the various Courts of Appeals which have interpreted and followed the *CATCO* decision:

> "• • • • the Commission properly refers to circumstances under which an unconditional and permanent certificate might be issued notwithstanding the fact that the proposed price is out of line." *United Gas Improvement Company* v. *Federal Power Commission* (9 Cir. 1960), 283 F. 2d 817, 821.[9]
>
> "It is conceivable that in some circumstances public convenience and necessity may require certificating of a sale when the price is 'out of line'." *United Gas Improvement Company* v. *Federal Power Commission* (10 Cir. 1961), 287 F. 2d 159, 163.
>
> "It was clearly encumbent on the proponent of such a rate to make some showing of the 'reason why' (as it was expressed in the CATCO opinion) 21½ cents, excluding tax reimbursement, is a proper initial rate in 1958 when the parties were freely contracting in 1954 at half that figure." *United Gas Improvement Company* v. *Federal Power Commission* (5 Cir. 1961), 290 F. 2d 133, 138.
>
> "•••• the record makes it clear that the finding of public necessity and convenience here is based too strongly on the fact that arm's length dealing and the effect of supply and demand required Transco to agree to the disputed price, *rather than that the price had*

> *any relation to what might ultimately be found to be a just and reasonable price." United Gas Improvement Co.* v. *Federal Power Commission* (5 Cir. 1961), 290 F. 2d 147, 148.[9] (Emphasis added.)
>
> "We read the CATCO decision as posing for the Commission two alternative courses in cases where a natural gas company seeks certification of sales at prices which are suspiciously higher than other or former prices in the area, or which in some other way will tend to have an inflationary impact upon the natural gas market. As one solution **** (interim conditions may attach) ****. On the other hand, it may grant unconditional certification upon evidence sufficient to 'support a finding of public convenience and necessity'." *Public Service Com.* v. *Federal Power Commission,* (D.C. Cir. 1960), 287 F. 2d 146, 149.

These decisions clearly hold that a finding of public convenience and necessity requires an evaluation of ALL factors which bear on the public interest.[10] The Court below properly held that consideration of less than all of the factors and circumstances offered in evidence which may

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[9] It is to be noted that the Ninth and Fifth Circuit decisions constitute the law of the case applicable to Superior's remanded proceedings as announced by the remanding Courts. Both Courts clearly required that all circumstances must be evaluated. The relevance of such matters is not open to question in the *same* proceeding after remand. *Federal Power Commission* v. *Pacific Light & Power Co.* (1939), 307 U.S. 156, 160; *Morand Bros. Beverage Co.* v. *National Labor Relations Board* (7 Cir. 1953), 204 F. 2d 529, 532, cert. den. 346 U.S. 909. See also *City of Pittsburgh* v. *Federal Power Commission* (D.C. Cir. 1955), 237 F. 2d 741, 752-753; *American Airlines, Inc.* v. *C.A.B.* (D.C. Cir. 1951), 192 F. 2d 417, 421.

[10] The issue of confiscation is always relevant where a rate or price is fixed. *Baltimore & Ohio R. Co.* v. *United States* (1936), 298 U.S. 349, 363; *Federal Power Commission* v. *Natural Gas Pipeline Co.* (1942), 315 U.S. 575, 585; *Pacific Natural Gas Co.* v. *Federal Power Commission* (9 Cir. 1960), 276 F. 2d 350, 353.

have a present or future bearing on the public convenience and necessity is error.

In holding that the "in line" price is not the only factor to be considered in determining the public convenience and necessity, the decision of the Court below did not conflict with the holdings of any other Court of Appeals.

The decision most cited as in conflict is that of *Public Service Commission* v. *Federal Power Commission*, (D.C. Cir. 1964), 329 F. 2d 242 (Skelly). That Court held that the less extensive economic evidence there tendered was not relevant *to a determination of the "in line" price:*

> "These proceedings under Section 7, considered with the Catco decision, *permit the Commission to fix the 'in line' price,* not on a basis of cash outlay or replacement costs, but on the basis of the price level established by comparable sales contracted for by those placing gas in the area in interstate commerce." (Pg. 246, emphasis added.)

The issue before the Court in *Skelly, supra,* was *what* was the "in line" price. The petitioners contended that the Commission had found the line too low. It was in this light that the Court said: "• • • the Commission in Section 7 proceedings • • • [may] condition certificates by requiring an 'in line' initial price." Here the Court below did not even consider the propriety of the Commission's finding of "in line" price. It held that other tendered evidence was improperly rejected because it presented factors of the public convenience and necessity which must be determined along with that of whether the price was "out of line." It was evidence which might justify even an out-of-line price. The Court held that such evidence should have been considered because, despite its prime importance, price line is not the sole factor of public convenience and necessity.

The action of the Court below squares completely with the further holding in *Skelly, supra,* that while economic evidence is not relevant to an "in line" determination

> "In so deciding we need not hold that the Commission may never consider such evidence if the circumstances in a particular case move it to do so consistently with its obligations under Catco." 329 F. 2d at Pg. 247.

Since *CATCO* requires an evaluation of all factors of public convenience and necessity, and the evidence here tendered presented factors other than "in line" price, it is clear that there is no conflict between *Skelly* and the decision below as to the consideration of economic evidence in determining the overall public convenience and necessity.

Nor is there any conflict with the decisions in *California Oil Company* v. *Federal Power Commission* (10 Cir. 1963), 315 F. 2d 652; *Atlantic Refining Company v. Federal Power Commission* (D. C. Cir. 1963) 316 F. 2d 677; or *Texaco Inc.* v. *Federal Power Commission* (5 Cir. 1961), 290 F. 2d 149. In each of these cases the issue was the proper level of the "in line" price, not whether an out-of-line price was justified by an evaluation of all of the factors of public convenience and necessity which the record disclosed. This was expressly stated in *Atlantic,* supra, at Pg. 680:

> "Petitioner argues that even under Catco there are considerations other than price in determining whether a certificate of convenience and necessity should be issued under Section 7. That, of course, is true. But here the petitioner **** agreed that price was the only issue to be considered ****."

In *California Oil Company*, supra, the Court repeatedly demonstrated that it was considering only the determination of the "in line" price:

> "* * * we also have serious doubts as to whether any of the costs or delivery services urged by petitioner to sustain the initial price of 18.5 cents are relevant at all *in determining the 'in line' price* in a Section 7 proceeding." (Pg. 659, emphasis added.)

> "We do not think that the Commission was required in this case to consider the exploration and drilling costs or the cost of delivery services *in arriving at the 'in line' price* in a certification proceeding." (Pg. 660, emphasis added.)

In none of the above cases was a record made nor evidence offered to show a "reason why" a price, even though "out of line", was nevertheless required by present or future public convenience and necessity. Nor did the record made in any of said cases show that a price conditioned below that proposed would be confiscatory. Here the evidence offered showed both of these things. The circumstances of this particular case were completely different from the other cases claimed to be in conflict with the decision below. Here the Commission determined an "in line" price which it used as the basis for ordering refunds retroactive over a four-year period. Regardless of the words used, the plain fact is that the Commission here fixed a retroactive rate based solely on "in line" price, and refused to consider any other factor or evidence. The Court below held that all factors must be considered and that an opportunity must be allowed to justify an out-of-line price. No court has decided that an out-of-line price could not be justified or that confiscation is not relevant and material to the issue of certification. There has been no conflict in the Courts of Appeals on this issue.

Refunds, if Any, Must be Based on The Difference Between a Just And Reasonable Rate And The Rate Collected Under The Invalid Commission Orders

The Court below properly held that if refunds are to be ordered "to meet the exigencies of this unique case", such refunds must be based upon the difference between the price collected and a "just and reasonable" rate.

Just as the Act, Sections 4 and 5, precludes a natural gas company from collecting rates in excess of a just and reasonable rate, so does it deprive the customers of a natural gas company of the right to a rate which is less than just and reasonable. The just and reasonable rate, which only by coincidence is the same as an "in line" price, is what the gas customer should pay, and what the gas company should receive. This is the only lawful rate under the Natural Gas Act.

The holding below on this point is clearly consistent with the decision in *Skelly, supra,* which held that refunds could be ordered of rates collected under temporary certificates but that such refunds, if any, should be based on standards of equity. The Court there remanded the cause for "further development and fuller consideration of the equitable factors * * *" and pointed out:

> "The existence of the power, however, does not mean that its exercise is mandatory, as petitioners * * * assert. Here we follow the standard adopted by the Commission, namely, the standard of equity * * *We do not attempt an enumeration of all equitable considerations involved. * * * There must be, with the assistance of the parties, a broader and more penetrating analysis and consideration of the factors pro and con a refund, and its amount or extent, in arriving at an equitable conclusion." (Pg. 250)

As said in *Atlantic Coast Line R. Co.* v. *Florida* (1935), 295 U.S. 301, the inquiry is not whether Superior should

have received the money but rather whether, having received it, Superior should be required to repay all or any part of it. Any claim of restitution of money paid by erroneous judgment or order is a claim of equity and not of right. Restitution does not lie unless unjust enrichment has occurred. If the holder of the money has not profited, there is no equitable basis for restitution. *Atlantic Coast Line, supra,* Pg. 309-313. This also brings into sharp focus the error of the Commission in refusing to receive or consider evidence of cost-of-service, financial requirements, and economic trends, which showed that the unit prices were less than Superior's actual cost of finding and producing the gas and less than its financial requirements. This rejected evidence showed that Superior was not enriched at all, either justly or unjustly. Unwittingly, it had agreed to sell this gas at less than cost during the initial contract period because such contracts had not been negotiated on a cost basis or even with knowledge of actual costs. No principle of restitution or equity will support the refund to the "in line" price on the record here. Such a refund would be confiscatory rather than equitable. Public convenience and necessity, the criterion for certification under Section 7, can never require that the Commission compel refunds based on confiscatory rates. Confiscation is always relevant where a rate or price is involved. *Baltimore and Ohio R. Co.* v. *United States,* and *Federal Power Commission* v. *Natural Gas Pipeline Company of America,* footnote 10 supra. This is particularly true in the unique situation here, and this Court's holding in *Wisconsin* v. *Federal Power Commission* (1963), 373 U.S. 294, is in point:

"• • • the sole question was whether all or any part of the increases had to be refunded by Phillips. Having decided on the basis of substantial evidence that

the increases did not bring revenues up to cost of service, the Commission properly concluded, on the only matter before it with respect to these dockets, that no refund obligation could be imposed." (Pg. 306)

The Moratorium on Contractually Authorized Rate Increases

The Court below followed the well established rule that the Commission has no power under the Act to condition a *permanent* certificate so that the natural gas company will be deprived of the statutory procedures for changing rates after such certificate has become effective. That the Commission has the power to so condition *temporary* certificates because of their ex parte nature is no basis for disruption of the comprehensive scheme of rate regulation designed by Congress on a permanent basis. The Commission order here would deprive these applicants of their statutory rate changing rights and prevent filing for price increases permitted by contract for nearly four years in the future.

This Court has repeatedly interpreted the Act as authorizing gas companies to fix and file rates under Section 4 after permanent certification has been granted. Citing its oft-quoted decisions in *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.* (1956), 350 U.S. 332 (Mobile); and *United Gas Pipe Line Co.* v. *Memphis Gas, Light and Water Division* (1958), 358 U.S. 103, at Pg. 113 (Memphis), this Court in (*CATCO*), *supra,* said at Pg. 389 that Section 7(e) vests control in the Commission of the conditions under which gas may be initially dedicated, and that once dedicated there can be no withdrawal without Commission approval, but:

"The gas operator, although to this extent a captive subject to the jurisdiction of the Commission is not

without remedy to protect himself. He may, *unless otherwise* bound by contract **** file new rate schedules with the Commission. This rate becomes effective upon its filing, subject to the 5-month suspension provision of Section 4 * * * *This not only gives the natural gas company opportunity to increase its rates where justified* but likewise guarantees that the consumer may recover refunds for moneys paid under excessive increases." (p. 389, Emphasis added.)

Again, in *Wisconsin* v. *Federal Power Commission, supra,* this Court said, at p. 304:

> "Thus we have sustained the right of a seller to file an increase under a contract which, in effect, authorized him to do so at any time." (citing Memphis, supra)

In its most recent decision on the matter, *Federal Power Commission* v. *H. L. Hunt, supra,* this Court carefully distinguished between temporary and permanent certificates, and said 84 S. Ct. at 866:

> "Under the procedures of the Act, it is at the point of permanent or unconditional temporary certification that the provisions of Section 4 become applicable. The gas has been permanently certificated into interstate commerce and the independent producer is then free to pursue the rate filing procedure of that section."

The Courts of Appeals which have recognized the conditioning power of the Commission under Section 7 have largely based such power on the right of the natural gas company to file rate changes under Section 4 once the permanent certificate is granted. See *The Atlantic Refining Company* v. *Federal Power Commission* (D.C. Cir. 1963), 316 F. 2d 677, 679:

> "In arriving at initial rates under Section 7, the Commission, of course, does not foreclose a company from obtaining an increase under Section 4. * * * *

> Since there is no mechanism for refund of overcharges under Section 7, if the Commission is to err in setting an initial rate, it should err on the low side *because the company, under Section 4, can immediately increase the rate,* subject to disallowance by the Commission after a full rate proceeding, the public being protected with reference to refunds in the interim." (Emphasis added.)

See *Texaco Inc.* v. *Federal Power Commission,* (5 Cir. 1961) 290 F. 2d 149, 156:

> "* * * we find no authority for holding that a producer does not have the right immediately to file a proposed rate increase of 20 cents per Mcf after complying with the condition that it file a new schedule carrying an intial price of 17.7 cents in lieu of the 20 cent rate in the contract. * * * *"

And *California Oil Company* v. *Federal Power Commission* (10 Cir. 1963), 315 F. 2d 652, at Pg. 660:

> "* * * * we think it is appropriate here to say that *there is nothing to prevent petitioner from immediately filing a proposed rate increase* to 18.5 cents after complying with the condition requiring it to file a new schedule carrying an initial price of 15.384 cents per Mcf, which it apparently has done. * * * *"

The Petitioners here suggest that *H. L. Hunt, supra,* and *Federal Power Commission* v. *Texaco Inc.,* 377 U.S. 33, are "inconsistent in principle and reasoning" with the decision below.[11] Such is not the case. *H. L. Hunt,* as mentioned above, involved such a condition in a *temporary* ex parte order:

> "In view of the ex parte nature of the proceeding, it appears only fair to all concerned that the condition upon which the rate was temporarily certified be con-

[11] Petition No. 756, Pgs. 12-13.

tinued unchanged until the permanent certificate is issued."

Also see quotation from the *same case, supra,* Pg. 17.

Texaco Inc., supra, is wholly inapposite. It sustained a general rule which proscribed particular contract provisions as contrary to public interest because they might provide "indefinite" pricing. That order and the reasoning sustaining it lend no precedent for an *ad hoc* determination that definitely stated pricing provisions to be effective at stated points in time may be held ineffectual, particularly when there is no record evidence to support such proscription and the hearing called was limited in scope to only the "public interest INITIAL price".

The decision below on this point is supported by unbroken decision, the Act itself, and is eminently correct.

The Practicality of the Decision Below

We have pointed out above that the decision below on the issues raised by the several Petitions here opposed is legally correct and is supported by unbroken precedent. The Petitioners, however, contend that the effect of such decision will create impossible administrative burdens and create hearings that constitute administrative monstrosities. We submit that any other procedure will lack legality and therefore is wholly impracticable.

The Natural Gas Act was designed by Congress to place a burden on the Commission. Excepting administration of the Federal Power Act, the Commission has no other reason to exist. Thus, it is no answer to say that the full hearings required by the Natural Gas Act to permit all applicants who are, or propose to become, natural gas companies to advance and protect their statutory rights, and those protected by the Constitution will inter-

fere with expeditious administration of the Act. Such is administration of the Act.

No one belittles the administrative difficulty and burden of determining and weighing all aspects of present or future public convenience and necessity. Nor can it be denied that consideration of only part of the factors of public convenience will reduce the burden and permit more expeditious disposition of pending applications. The same result would follow from a construction that the Act regulates natural gas companies in only one geographical area, rather than the whole United States, but both are contrary to the Congressional enactment and they would be equally illegal. The Act is designed to protect the rights conferred thereby on natural gas companies and the public with all expedition that is reasonably possible. Not to provide expedition at all costs and in violation of such rights.

It is contended that deferment of refunds until the amount, if any, by which the rates collected can be determined to exceed just and reasonable rates for the applicants is contrary to the purpose of the Act. A type of "justice delayed is justice denied" argument. The conclusion would have merit if the premise were well founded. Justice here demands that applicants receive, and their customers pay, a just and reasonable rate. Neither is entitled under the Act to more or less. Only a just and reasonable rate is lawful under the Act and its only purpose is to protect consumers against unreasonably high rates. All concede that an "in line" price is wholly unrelated to a just and reasonable rate.

Petitioners point to "administrative monstrosities" which would result from a need to weigh and consider all factors of public interest, or from the need for just

and reasonable rate determinations for each of these applicants. They fail to note that this is exactly what the Act provides. Each applicant and each natural gas company is entitled to such type of hearing. Administrative monstrosities result from an unbridled use of the consolidation power. The present situation might well be called a monstrosity. Supra Pg. 3. This monstrosity and its progenitors have done little to expedite final disposition of any of the matters involved.

Expeditious disposition of certificate and rate matters before the Commission would seem to be best obtained by creation of standards for such hearings consistent with the protection of the rights of the parties provided for by the Act. Announcement of factors of public convenience and necessity which would be deemed sufficient to justify a price in excess of an "in line" price, or be deemed to amount to a "reason why" such price is required by public convenience and necessity would eliminate an applicant's need to present testimony on every available factor of public interest. The same would be true in connection with the determination of just and reasonable rates. This approach would expedite preparation of cases and the time for hearing and decision, without violation of the Commission's duty to grant full and fair hearings.

The decision below points to the unusual and peculiar circumstances of the instant proceeding. In this unique situation the procedure provided below is the only available legal procedure, and it in fact entails no undue or impossible administrative burdens. The end to be sought is final disposition, not a series of short but ineffectual hearings.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the Petitions For Writ of Certiorari should each be denied.

Respectfully,

HERBERT W. VARNER
P. O. Box 1521
Houston, Texas 77001

Attorney for
The Superior Oil Company

Of Counsel:

MURRAY CHRISTIAN
P. O. Box 1521
Houston, Texas 77001

ROLAND B. VOIGHT
1504 Chamber of
Commerce Bldg.
Houston, Texas 77002

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